United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1346

In The

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

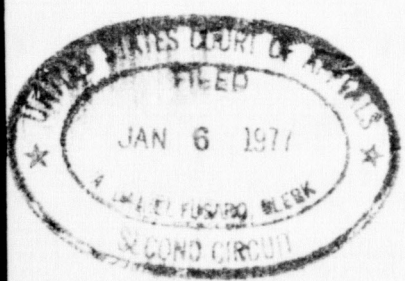
WALTER R. CONLIN,

Defendant-Appellant.

B P/S

Appeal from a Judgment of Conviction in the
United States District Court for the
Western District of New York at 74-265

BRIEF FOR APPELLEE



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Issues Presented*

In the opinion of the Appellee, the following issues are presented:

1. Whether the evidence presented at trial was sufficient to sustain the conviction of assisting in the preparation of false and fraudulent tax returns.

The Government's position is that there is sufficient evidence for the jury to conclude that Walter Conlin assisted in the preparation of false and fraudulent tax returns.

2. Whether the admission in evidence of the testimony of Revenue Agent Matyjakowski and his summary exhibit constituted reversible error.

The Government's position is that the admission of this evidence is not error.

3. Whether the admission in evidence of the defendant's silence when interviewed by FBI agents caused a reversible error to occur.

The Government's position is that no reversible error was committed because of the specific facts of this case.

4. Whether the content of the Court's instructions to the jury and its alleged failure to comply with Rule 30 of the Federal Rules of Criminal Procedure require a reversal of the conviction.

The Government's position is that this action did rise to the level of reversible error.

5. Whether the evidence presented on Count 15 was sufficient to sustain the conviction.

The Government's position is that there is sufficient evidence to sustain the conviction.

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*This case has not previously been before this Court.

6. Whether the numerous errors that occurred before and during the trial deprived the defendant of a fair trial.

The Government's position is that that defendant was given a full and fair trial and there was substantial evidence to support the verdict.

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Counterstatement of the Case

On April 8, 1976, Walter Conlin was convicted on eight counts of wilfully assisting in the preparation of false federal income tax returns; one count of destroying government records of the Small Business Administration, and one count of submitting a false loan document to the Small Business Administration.

The jury trial began on March 24, 1976 and thirty-six witnesses testified during the trial. On April 8, 1976 the jury found the defendant guilty on 10 counts of a 15-count indictment and acquitted him of the remaining counts.

On May 10, 1976, Walter Conlin was fined a total of $5,000, given concurrent two year suspended sentence on each count, and placed on probation for a total of two years.

Counterstatement of Facts

Walter R. Conlin, a licensed public accountant, is the sole proprietor of the Southern Tier Accounting and Tax Bureau in Corning, New York (Tr. 1094).* His experience as an accountant dated from approximately 1941 when he was in industrial accounting, and in 1952 Conlin opened his own business in Corning, New York (Tr. 1092-94). He is a high school graduate, attended Marshal College, Huntington, West Virginia for one year, and received his accounting education from the United States Armed Forces Institute at the University of Michigan for one year (Tr. 982). His practical experience continued over a period of 30 years prior to indictment during which the defendant attended tax conferences sponsored by the Internal Revenue Service and the Empire State Public Accounting Association and subscribed to and purchased the Standard Official Tax Services (Tr. 1092-1100). During a period of this time, Conlin was President and Manager of the Steuben Television Antenna Systems, Inc., the Steuben Electronics Corporation, the Chemung County Master Television Antenna Corporation and the Montour Fall Master Television Antenna Corporation and was the accounting supervisor of the books and records of those corporations (Tr. 1104-06). Prior to 1965, Conlin engaged in practice before the Internal Revenue Service. In 1965, Conlin's privilege of limited practice before the Internal Revenue Service was withdrawn by the District Director at least because he filed late personal returns and was classified as dilatory in his practice (Tr. 1100-01). His experience over the twenty-five years he operated the Southern Tier Accounting and Tax Bureau consisted of preparing both State and Federal tax returns for individuals and corporations and keeping the books of several small businesses.

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* "Tr." refers to the trial transcript; "App I" refers to the Appellant's Appendix; "App II" refers to the Appellee's Appendix. The numbers appearing after these references refer to the pages of the document.

In addition, following Hurricane Agnes, Mr. Conlin assisted clients in preparing and submitting loan applications to the Small Business Administration (SBA) for flood-related losses.

The defendant was indicted on substantive charges that fall into these major categories:

1. Aiding and Assisting in the Preparation of false and fraudulent income tax returns — 13 counts;

2. Destruction of Government Documents — 1 Count;

3. Submitting a false document to the S.B.A. — 1 Count.

1. *False Tax Returns*

The Government's proof at trial relative to Mr. Conlin's false and fraudulent preparation of federal income tax returns consisted primarily of the testimony of the taxpayers themselves who testified that the bulk of the information on their tax returns relating to itemized deductions was false and that they did not supply Mr. Conlin the information or ask him to include this information on their returns. In fact, in many instances the taxpayers testified that they had prepared worksheets themselves showing the accurate information (i.e., taxpayers: Ryder; Payne, Minier; Lamb; Ross; Wenderlick and Bassney); in at least two instances these worksheets were turned over to Walter Conlin for the preparation of the return (i.e. Taxpayers Ryder and Lamb) and in one instance the Taxpayer testified that she turned over the worksheet to Conlin for the preparation of the return and did not even have a conversation with him prior to the time Conlin prepared the return (i.e., Taxpayer Lamb). Despite this, the income tax return of Lamb contained false information that did not even appear on the worksheet submitted to Conlin. In addition, there was a marked similarity between the false information shown on each of the returns admitted into evidence.

Mr. Conlin substantially contradicted the testimony of each of the Government's some thirty witnesses and thereby reduced the issue to one of credibility. The jury apparently resolved this issue by choosing to believe the Government's witnesses, and disbelieve Walter Conlin, with regard to at least 8 counts of the 13 counts relating to these charges.

2. *Destruction of Government Property*

The Government's proof regarding this Count of the indictment came substantially from the officials of the SBA in Elmira, N.Y. Several witnesses testified that on January 4, 1974, Walter Conlin delivered what purported to be the filed tax returns of Thomas Gill to the SBA to be used in connection with Mr. Gill's application for a disaster relief loan. At the time these items were submitted, they became part of the files of the SBA.

On January 18, 1974 Walter Conlin and Thomas Gill met with James Cristofero of the SBA. At that meeting, Cristofero showed Conlin and Gill the tax returns submitted to the SBA on January 4 and 1974 (Tr. 54-56) and asked if they had been filed with the Internal Revenue Service. After being assured that they were filed returns, Cristofero asked Gill to sign them as taxpayer, and Conlin to sign them as the preparer. Both Conlin and Gill did sign the returns.

Thereafter, Mr. Cristofero gave Mr. Conlin a memorandum which, among other things, told Conlin that the SBA would be verifying the information on these returns with the Internal Revenue Service. After realizing that the returns would be checked, Mr. Conlin grabbed the previously submitted returns and put them in his briefcase.

Despite repeated requests by SBA officials, Mr. Conlin did not return the items he had taken and, instead, he began to tear and destroy the tax returns and stuff the pieces in his clothing. All the while, Conlin did not speak a word or give the SBA

officials a word of explanation for what he was doing despite repeated questions from S.B.A. officials. Mr. Conlin testified to the contrary, maintaining that he told them from the beginning that he had not previously submitted the returns and therefore they could not be part of the SBA files.

The F.B.I. was called to the S.B.A. office and upon their arrival, they found Conlin walking around the office, ripping the tax returns into small bits and stuffing them in his clothing. The crime was taking place in their presence and before their eyes. They asked Conlin what he was doing and he did not respond. They asked him why he was taking these documents and he did not respond.

Thereafter, Mr. Conlin was advised of his constitutional rights, arrested and searched. The returns that he had been tearing up were recovered from different parts of his body and clothing and were subsequently pieced together. The information appearing on these returns was shown to be materially false and the amounts overstated in excess of $100,000. These returns and the information therein was prepared by Conlin. The purpose for doing this was presumably to substantiate a flood loss far in excess of the actual loss to the client. Conlin's motive, presumably, was to charge a high fee for his services.

Conlin testified that the returns which he had destroyed were not part of the SBA files since he had never submitted them to the S.B.A. He said he brought them into the SBA Office on Jan. 18, 1974. He testified that he told this to the SBA officials from the very beginning. The SBA officials testified that Conlin said nothing throughout the period of time he was destroying the government documents. The F.B.I. testified that one hour after Mr. Conlin's arrest and without the F.B.I. asking any questions to him, Conlin, out of the blue, volunteered the explanation that the destroyed returns had never become part of the SBA files, because he had never submitted them to the SBA. This

volunteered statement was a false exulpatory statement offered by the defendant. It was contradicted by at least three SBA officials who testified at trial.

3. *Submitting False Documents to S.B.A.*

The government's proof in this regard was the testimony of SBA officials to the effect that Conlin was to submit "filed" tax returns in connection with his personal claim for a disaster relief loan. He submitted purportedly filed returns, which were dated, to the SBA. The testimony was that the SBA relied on the facts in these returns, some of which were false, and gave Conlin a large loan.

The government's proof was that the returns had not been filed, that Conlin knew that and that he knew the information on the returns was false. Conlin denied this, but the jury apparently chose to believe the Government's witnesses. The proof was that the returns were not filed until after the filing of this indictment.

The only issue is one of credibility, the jury decided that issue against Mr. Conlin and returned a guilty verdict on Count XV.

ARGUMENT

POINT I

The evidence at trial was substantial and was fully sufficient for the jury to conclude that the defendant wilfully assisted in the false and fraudulent preparation of income tax returns.

In order for the government to obtain a conviction of the first 13 counts of the indictment, it is required to prove beyond a reasonable doubt that:

1. Conlin prepared the tax returns involved;

2. the tax returns contained false and fraudulent information and

3. Conlin wilfully included the false and fraudulent information on the tax return knowing that it was false and fraudulent.

The testimony at trial and the documents admitted into evidence established without doubt the first two elements. The defendant-appellant does not question the Government's proof on these elements.

The only issue the defendant-appellant argues is that the evidence submitted by the government was insufficient as a matter of law to find the defendant guilty. In support of this argument, the defendant-appellant submits a very short review of some 1350 pages of trial testimony (Brief of Defendant-Appellant, pp. 10-21).

In essence, the issue is one of credibility. Each of the government's witnesses testified that Conlin had put false information on their returns and each denied that they told Conlin the false information. Although Conlin denied this in each case, the jury apparently did not believe Conlin or chose to believe the Government's witnesses instead. A motive submitted for

Conlin's actions was to enable him to charge excessive fees for preparing the return, on the basis that the taxpayer was getting a large refund.

In effect, Appellant contends that as a matter of law the court should have granted his motion for judgment of acquittal on the ground that the government failed to establish its case for a violation of Title 26, United States Code, Section 7206(2). Such a contention betrays a misunderstanding of both the evidence in this case and the function of the court and jury in a criminal trial.

It is settled, of course, that this Court, in reviewing the denial of such a motion, must examine the evidence in the light most favorable to the Government and must determine whether a reasonable mind might fairly conclude guilt beyond a reasonable doubt, making full allowance for the jury to assess the credibility of the witnesses, weigh the evidence and draw justifiable inferences from it. *United States v. Barash*, 412 F.2d 26 (2nd Cir. 1969); *United States v. Aiken*, 373 F.2d 294 (2d Cir. 1967); *Crawford v. United States*, 375 F.2d 332 (D.C. Cir. 1967); *United States v. Wilson*, 342 F.2d 43 (2d Cir. 1965); *United States v. De Sisto*, 329 F.2d 929 (2d Cir. 1964) *cert. denied* 377 U.S. 979 (1964).

In this case, the evidence, particularly when viewed in the light most favorable to the government, presents an overwhelming case that the appellant is guilty beyond a reasonable doubt. This evidence is as follows:

1. The testimony of each government witness who testified that Conlin put information on their tax returns which they did not tell him and which was materially false. (App. II — direct testimony of all witnesses).

2. The similarity of the false deductions on each return as compared to the false information on other returns.

3. The extremely high fees charged by Conlin for the preparation of simple income tax returns. The fees in some cases exceeded $250.

4. The failure by Conlin, after he took the stand, to give believable explanations for the materially false information appearing on the subject returns (Tr. 1092-1278). For example, his explanation for the deductions taken in connection with the returns of Richardean Wenderlich are patently unbelievable (Tr. 1139-1166).

While there is certainly other evidence upon which the jury could base its findings, these items alone lead irresistably to the conclusion that the defendant could be found guilty beyond a reasonable doubt by the jury.

The fact that the government's case rested, in part, on circumstantial evidence is of significant import. *United States v. Harris*, 435 F.2d 74 (1970). It is well-recognized, of course, that circumstantial evidence is not an inferior type of evidence and is no different from direct testimonial evidence. *Holland v. United States*, 348 U.S. 121 (1954); *United States v. Brown*, 236 F.2d 403 (2d Cir. 1956). As the Supreme Court has remarked, "[D]irect evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Micholic v. Cleveland Tanker, Inc.*, 364 U.S. 325 (1960).

In this case, the evidence, both direct and circumstantial, is overwhelming. While the defendant-appellant clearly disagrees with the jury verdict, it can hardly be seriously argued that there was no evidence upon which the jury could rely to support its verdict.

The defendant-appellant argues that in order to sustain the burden of proof the element of wilfulness, the evidence must show "bad purpose and evil motive" as defined in *U.S. v. Bishop*, 412 U.S. 346 (1973). It is submitted that where the

defendant placed materially false information in the tax returns of his clients; charged them high fees based on the larger refund, with the net effect that the Government was not given its fair share of income taxes, that the essence of the whole scheme is filled with "bad purpose and evil motive".

However, the government need not prove "bad purpose and evil motive" as an element of willfulness. Instead, the Supreme Court has said that the term "willfulness" simply means a "voluntary, intentional violation of a known legal duty." *U.S. v. Pomponio*, (Sup. Ct. No. 75-1667 October 12, 1976) U.S. (1976). Since this standard is not as great a burden as the "bad purpose and evil motive" standard, there can be no serious question as to the sufficiency of proof.

POINT II

The admission of the testimony and exhibit of the government's expert witness was not error.

The testimony of the government's expert and the exhibit he prepared (G-68) were properly admitted into evidence. The government's expert was an internal revenue agent who testified as to his qualifications (Tr. 768) in the field of Federal Income Tax law, had heard all the testimony and reviewed the exhibits in the government's case. Based upon the government's evidence he prepared a summary chart or schedule (Tr. 769). The use of such charts in tax cases has been held acceptable and well within the trial court's discretion, *United States v. Johnson*, 319 U.S. 503, 519 (1943); *United States v. Silverman*, 449 F.2d 1341, 1346, (2d. Cir. 1971), *cert. denied* 405 U.S. 918 (1971); *United States v. Goldberg*, 401 F.2d 644, 647 (2d Cir 1969). The trial judge here properly instructed the jury that the figures in the exhibit were only as good as the government's evidence and the chart had "no evidentiary value in and of itself." (Tr. 1528).

The government submits that in the context of this case the court's instruction went farther than required. The properly qualified expert's opinions were competent and relevant evidence on the issue of whether the thirteen tax returns involved "were false and fraudulent as to material matters" as alleged in the indictment. Although the materiality of the false items was not seriously contested by the defense, the government was required to prove their materiality. This expert testimony was competent and relevant evidence of such materiality.

Clearly the jury did not place undue emphasis on this exhibit since the jury acquitted Conlin on five of the counts covered in that exhibit. The jury must have rejected either the government's evidence, or the expert's opinion on those five counts. Since the expert's opinion was only offered as to materiality, the acquittal on five counts shows that this expert did not invade the province of the jury. In addition, the record shows that the expert himself testified that the chart, in and of itself, did not show that a crime had been committed (Tr. 854).

Conlin argues that the exhibit was not based upon the evidence. However, he has not shown one instance where an item had no evidentiary basis. The witness testified that all the items were based upon the testimony and exhibits (Tr. 769).

Conlin relies on a decision from another Circuit which is entirely distinguishable and, therefore, not controlling on these facts. In *Steele v. United States*, 222 F.2d 628 (5th Cir. 1955) the Court was dealing with a tax evasion charge and not a charge of preparing returns that were false and fraudulent as to *material matters*. In *Steele* the Court found the summaries inadmissible because the agent evaluated the testimony and credibility of witnesses in preparing the chart, whereas here the expert witness did not. His opinion was not directed to the credibility of witnesses, but to the application of federal tax law to the evidence produced before the jury. Finally, in *Steele* the Court found that the reversible error came from the manner in

which the summary charts were presented to the jury. In *Steele* the prosecutor, over defense objections, succeeded in having the charts sent to the jury without any other exhibits and after the jury had begun to deliberate. In doing so, it obviously gave undue emphasis to the incompetent exhibit. In Conlin's case the expert's exhibit was given to the jury at the beginning of its deliberations along with all exhibits, defense and government exhibits, with the consent of defense counsel. The manner in which it was sent to the jury and the acquittal on five of the counts demonstrate that the jury did not unduly emphasize this exhibit.

Even if this Court were to adopt the standard Conlin seeks, the standard of another Circuit in *Gordon v. United States*, 438 F.2d 858, 876-77 (5th Cir. 1971) (see appellant's brief p. 26), the summary exhibit herein was properly admitted.

The Court did ascertain that the figures were based upon the evidence including the competent and relevant opinion evidence which the jury heard and saw. The primary evidence was available to defense counsel who was granted an adjournment to compare the chart to the evidence (Tr. 771). The chart was tested on cross-examination (Tr. 815 *et seq.*). And finally, the jury was instructed as to the significance of the summary as suggested in *Gordon*. In fact the Court practically instructed the jury to disregard the exhibit. "In regard to that chart, I instruct you that that chart has no independent existence or evidentiary value in and of itself." (Tr. 1528).

Even if this Court were to find that the exhibit was improperly admitted, that would not be grounds for reversal since the evidence of guilt in this case is overwhelming. Also the jury's verdict of not guilty on five of the thirteen items in that chart demonstrates it did not influence them in their verdict. In fact, the Court's handling of the witness and the witness's admission to the Court that he did not understand what the Court expected of him, coupled with the Court's charge on the exhibit, did much

to discredit the exhibit and limit its weight with the jury. Regardless of those things, however, the testimony of the witness and his exhibit were clearly admissible on the issue of materiality of the thirteen false and fraudulent returns prepared by the defendant Conlin.

POINT III

The circumstances of this case do not show that the prosecutor improperly used any reference to the defendant's silence or assertion of his Fifth Amendment privilege and, therefore, no reversible error is present.

The use by the prosecution of the defendant's silence *prior* to the *Miranda* warnings in questioning witnesses in no way violates the defendant's rights.

The use by the prosecution of the defendant's silence *after* the *Miranda* warnings were given for purposes of impeaching the defendant's credibility regarding his false exculpatory statement was proper because:

1. The defendant's silence after the *Miranda* warnings was a continuation of his silence prior to these warnings. There is no indication that he was relying on his right to remain silent.

2. The defendant remained silent before he was in custody, before the F.B.I was called and during the time he was actually destroying the documents in the presence of SBA officials who repeatedly asked him why he took the documents and why he was destroying them. This was not custodial interrogation, but part of the *res gestae* while the crime was in progress.

3. After approximately 1 and 1/2 hours in custody and not in response to any question, the defendant spontaneously and voluntarily made a false exculpatory statement regarding these documents. The questions by the prosecutor in the case in chief were not inflammatory or calculated to draw attention to the

defendant's silence, but merely to show the circumstances under which the defendant made his false exculpatory statement. His silence was not emphasized by the prosecutor either in its case in chief, cross-examination of the defendant, or in the summation. No such wrongful inference was wanted or argued by the prosecutor.

4. The circumstances of the defendant's silence were questioned by the defendant's attorney in his opening statement (Tr. 18) and from the very beginning of the case where SBA official James Cristofero was cross-examined (Tr. 114). It was the defendant's claim that he *did* talk throughout this period, using the same defense he urged at trial, and that all the government's witnesses were wrong and the defendant's spontaneous statement was not falsely exculpatory. The defendant has always claimed that he was not silent.

5. The defendant did not object to the prosecutor's questions regarding the circumstances under which the false exculpatory statement was made. Furthermore, the defendant, by making his statement at all may be considered to have waived his privilege, especially because his statement was false and moreover because he claims to have told the SBA officials his claim from the very beginning.

6. The defendant now questions the prosecutor's alleged comment on Conlin's silence, when at trial Conlin testified that he did not remain silent, but set forth his statement immediately.

7. This was not a confession by silence or a substantive use of silence as evidence of guilt, but merely an effort to set forth the circumstances under which the false exculpatory statement was made in the same fashion as impeachment by use of a prior inconsistent statement.

8. The prosecutor did not unduly emphasize the defendant's silence in the testimony, and never even mentioned it in his closing argument.

The defendant-appellant's argument on this point is out of context with the facts of this case; exaggerated, and critically distinguishable from the case the defendant cites in support of his position.

In June, 1976 the United States Supreme Court examined in detail a similar question. *Doyle v. Ohio*, No. 75-5014, June 17, 1976 ——U.S.——. While some of the reasoning of that decision applies to this case, the facts in this case make it wholly distinguishable from the *Doyle* situation. It is obvious that the prosecutor in the *Doyle* case made comments calculated to call attention to the defendant's silence: it was argued in detail in closing by the prosecutor; the prosecutor cross-examined the defendant regarding his silence at a preliminary hearing; the defendant did remain silent and never testified otherwise; the silence was post-arrest silence; and the testimony did not concern the defendant's silence during the commission of the crime. All of these factors are absent from this case and, thus, the *Doyle* decision is not wholly applicable.

However, even using the *Doyle* reasoning, this case is not one which violated the defendant's rights. While Conlin was advised of his *Miranda* rights shortly after the F.B.I. arrived, it is clear that he was not arrested until 1/2 hour later (Tr. 495-505 App. 11). This did not involve custodial interrogation at all. In addition, the defendant maintained from the very beginning of trial (i.e., cross-examination of James Cristofero, Tr. 114) that he gave an exculpatory statement immediately. Obviously, the defendant knew that the government intended to use Conlin's statement as falsely exculpatory, since this was part of the pretrial discovery.

When considering the principle case of *Doyle v. Ohio*, of particular importance is the statement by the majority that:

> It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of

> events and claims to have told the police the same version upon arrest. *Doyle v. Ohio*, page 12 n. 11

In this case, that is exactly what happened. The only reason that this was used in the case in chief was to counter the defense position taken in his opening statement (Tr. 18) and his cross-examination of the government's witnesses (i.e., Tr. 114). The Court specifically approved this use of the defendant's silence.

The first reference to the defendant's silence came from James J. Cristofero, an SBA official who testified very early in the two-week trial. At the time of this reference, the witness was describing the circumstances that existed when Conlin grabbed the documents and then began ripping them (Tr. 54-62, App. II). On cross-examination, the defense attorney repeatedly questioned Cristofero as to what Conlin said during the commission of the crime (Tr. 114-116). This questioning was consistent with the defense that the documents never became part of the SBA file (Tr. 18).

A second witness, Howard Garrity testified to what he saw and heard during the time Conlin was in the SBA office (Tr. 172-229, App. II). Mr. Garrity testified as to his admonitions to Conlin and as to Conlin's activities at the time he took and destroyed the government documents (Tr. 187-193, App. II). Despite the fact that Garrity told Conlin to stop, Conlin didn't say anything and continued to destroy the documents.

> Q. What did you observe when you came into the room? A. Well, as I walked in, and again, it is just around the corner, I was standing in the doorway and Mr. Cristofero said to me, "Howard, Mr. Conlin has just taken our tax returns and put them in his briefcase."
>
> And Mr. Cristofero advised him, you know, what he was doing was unlawful and that he should return them, that they were our tax returns and they couldn't be removed without our permission, and I repeated that.
>
> Q. Did Mr. Conlin say anything? A. He never said a word, nothing.

Q. And you told him that very fact yourself? A. Yes, I repeated it, you know, several different times because we have enough problems without getting into matters like that.

Q. Did he say anything to you at that time? A. No. He began to tear them up.

Q. And did you see him actually physically ripping them? A. Yes. You see, I was standing up so you know I was looking down upon everyone else who was seated, and I was looking down and he had them in his briefcase. His briefcase was sitting on his lap, and he had the tax returns inside, and he had his hands in there, and I could actually see him tearing them up in little pieces.

Q. After, did you say anything to him when you saw he was ripping these up? A. Yes, I did. I couldn't believe my eyes. I said, "Mr. Conlin, you are destroying property which belongs to an agency of the U.S. Government."

I said, "You must stop this right now."

I said, "You can't come into a government office and take files, take tax returns and put them in your briefcase and start tearing them up."

And I just didn't get any response. He never even acknowledged my presence, and he just kept tearing them up (Tr. 187-189, App. II).

The next witness to testify regarding Mr. Conlin's activities in the SBA office was Richard Rudy, a Special Agent of the F.B.I. During the direct testimony he described what Conlin was doing when he arrived and very blandly described the circumstances of advising Conlin of his constitutional rights and the fact that he did not interview Conlin further after this (Tr. 497-499, App. II). The defendant was not in custody until some 1/2 hour later and in the meantime continued to wander around the office destroying the returns.

> Q. Mr. Rudy, during the period of time that you were at the Small Business Administration office, did you see Mr. Conlin ripping anything? A. I saw his fingers moving, and then I saw bits of paper falling to the floor (Tr. 505).

The details of what occurred was fully pursued by the defense attorney in an effort to show that Conlin *did* tell the F.B.I. that he brought the returns in that day. The defendant has consistently maintained that he did talk to the F.B.I. On cross-examination, the defense attorney asked Mr. Rudy the following:

> Q. Did Mr. Conlin talk to Mr. Welch, an attorney over the phone? A. Mr. Conlin talked to somebody, as I understand it. I did not hear who he spoke to.
>
> Q. Now during the time that you were interviewing Mr. Conlin, was your partner with you, Mr. Bucher? A. I only made one attempt to interview him, and then I left him, and then my partner stood with him, and I don't know what transpired between them.
>
> Q. In making your reports, did you talk to your partner as to what Mr. Conlin had stated to him? A. No. My partner made his own report of what Mr. Conlin stated to him.
>
> Q. Did Mr. conlin ever state to you that he brought those 1040 returns that day to the SBA Office at Elmira, and he felt he had a right to take them back with him? A. No. Mr. Conlin refused to talk to me at all.

* * *

Despite this assertion here and in other portions of the transcript the defense went on to point out that Conlin, if he was silent, was well within his rights. This, of course, was never questioned or argued by the prosecutor.

> Q. Mr. Conlin was within his rights not to talk to you about this, is that correct? A. That's right, sir.

> Q. And you told him that he was within his rights not to talk to you? A. Yes. He was aware of that. He read the statement, and then he said he refused to comment.

The thrust of the examination of all witnesses was the circumstances under which the defendant made his false exculpatory statement. Furthermore, the defendant has consistently maintained that he did *not* remain silent. He attempts here on appeal to now claim that the government says he did and, therefore, committed reversible error.

It is submitted that the defendant cannot have it both ways . . . he either spoke and, therefore did not assert his right to remain silent or he didn't speak during the commission of the crime or after advisement of rights. In the event of the former situation, the defendant's argument is without merit. In the latter instance, the fact that the defendant made a false exculpatory statement, the circumstances of which indirectly and incidentally refer to some silence by Conlin does not rise to the level of reversible error. Cf. *U.S. v. Barney*, 371 F.2d 166 (7th Cir.) 1966; *U.S. v. Hines*, 455 F.2d 1317 (D.C. Cir. 1971).

POINT IV

The defendant was not denied a fair trial by reason of the Court's charge.

The actions of the trial court with regard to the jury charge did not deprive the defendant of a fair trial. Conlin attempts to convince this Court that there were reversible errors in apparent violations of Rule 30, Federal Rules of Criminal Procedure, combined with what he contends was a defective charge. However, a careful review of the record as a whole shows that the charge was more than adequate under the applicable standards, and that there was no reversible error as to Rule 30, if indeed there was any error at all.

The trial court covered all the elements of each offense: Counts I — XIII Tr. 1489, 1492, 1493, 1520, 1536, 1537, 1540, 1556; Count XIV Tr. 1521-1524; Count XV Tr. 1525-1527. Conlin now contends that the charge was defective because it superficially dealt with the element of wilfulness contending that the court covered this in only one page and that the charge did not require "bad purpose and evil motive." (Appellant's Brief p. 39 and 40).

The Supreme Court in *United States v. Bishop*, 412 U.S. 346 (1973) did not intend to require that "wilfulness" be defined as "bad purpose and evil motive." The Court has made clear in *United States v. Pomponio*, U.S. (75-1667, October 12, 1976) that in the context of alleged violations of the Internal Revenue Code, "wilfulness" simply means "a voluntary, intentional violation of a known legal duty." Therefore, the specific phraseology of "bad purpose and evil motive" is not required in the charge to the jury.

In view of this case, the trial court went further than required by using the terminology "criminal or evil intent" (Tr. 1493). The trial court defined "wilfully" as meaning "with criminal or evil intent of violating the statute." (Tr. 1493). While Conlin contends that this instruction was only one page long; he ignores the record that shows the Court used the defendant's words "criminal or evil intent" as to each count over and over again. (Tr. 1493, 1497, 1500, 1502, 1505, 1506, 1508, 1510, 1512, 1514, 1516, 1519, 1520 and 1557). Furthermore, the Court went so far as to use the words "bad purpose" at least once, although not required to do so (Tr. 1543). A thorough review of all of the Court's instructions show that the Court adequately charged the jury on all the elements.

Conlin erroneously contends that the trial court violated R. 30 and by so doing the defense summation "was subject to being disregarded by the jury, if the Court's instructions were inconsistent with it." (Appellant's Brief p. 40). However, a review

of the defense summation shows that just the opposite occurred. The defense summation constantly repeated the argument that there was no "criminal or evil intent" (Tr. 1427, 1428, 1429, 1431, 1432, 1443, 1448, 1459, 1460, 1462, 1463, 1468) and the trial court's instruction constantly repeated these same words; that the jury must find "criminal or evil intent" (Tr. 1493, 1497, 1500, 1505, 1506, 1508, 1510, 1512, 1514, 1516, 1519, 1520, and 1557). Clearly it is demonstrable on examination of the whole record that there was no prejudice to the defendant from the alleged violation of Rule 30.

In the circumstances herein, there was no violation of Rule 30. Defense counsel never requested a ruling on his requests to charge prior to summation, nor did he call this to the Court's attention prior to summation. Defense counsel never requested that his requested instructions be discussed outside the hearing or presence of the jury after the Court's initial charge. Defense counsel objected to only one part of the Court's initial charge and to certain of the government's request to charge. It is respectfully submitted that counsel's apparent satisfaction with the Court's method of proceeding waives any objection he might have as to compliance with Rule 30.

The cases cited by appellant Conlin for authority on violations of Rule 30 involved instances where defense counsel attempted to exercise their rights to a side bar conference and the Court refused. Here the right was not denied. It was never sought. Defense counsel remained silent on the matter of Rule 30 and allowed the Court to proceed. Now the defendant attempts to profit from counsel's silence.

If this Court determines that there was error in regard to Rule 30, that error is not reversible error. The Supreme Court has rejected the approach of automatic reversal for a violation of Rule 30, *Hamling v. United States*, 418 U.S. 87, 134 (1974). Instead, it held that in some manner the Court of Appeals must examine the prejudice to the defendant. The Supreme Court

specifically refused to express any view as to whether a court of appeals should follow the standard of our Second Circuit or the stricter test of the Third Circuit. Our standard has been that a violation of Rule 30 is not reversible error unless the defendant demonstrates that he has been prejudiced, *United States v. Hall*, 200 F.2d 957 (2d Cir. 1953); *United States v. Titus*, 221 F.2d 571 (2d Cir.) *cert. denied* 350 U.S. 832 (1955). Most recently this Court has stated the Second Circuit standard as grounds for reversal

> if there is reasonable basis for concluding that the colloquy held in the presence of the jury as a result of the judge's *ignoring or denying a proper request* to permit the objection to be made outside the jury's hearing was prejudicial. (Emphasis added.)
>
> *United States v. Fernandez*,
> 456 F.2d 638, 644 (2d Cir. 1972).

Conlin would have this Court adopt the stricter standard of the Third Circuit in *United States v. Schartner*, 426 F.2d 470, 479-80 (3d Cir. 1970) that reversal will follow unless it be demonstrable on an examination of the whole record that the denial of the right did not prejudice the defendant's case.

The government submits that there was no error because there was no denial of the right, and even if there was error, it is not reversible under either standard. The defendant has not shown any prejudice and the record as a whole shows that the defendant's case was not prejudiced. The jury believed his defense or had a reasonable doubt as to five of the fifteen counts and acquitted the defendant thereon. The record shows that the defense summation was repeatedly consistent with the Court's charge.

The defendant has not shown what he would have argued differently if he had known the Court's rulings on his requests to charge.

Most important of all is that the Court proceeded in the same manner with the government as with the defendant. The Supreme Court in *Hamling supra*, 418 U.S. at 134 discussed the reason for Rule 30. It was to avoid the subtle psychological pressures upon jurors which could arise if they were to view and hear defense counsel in a posture of apparent antagonism toward the judge. In this case the prosecution also made its requests and objections in the exact same manner as the defense.

Therefore if this case was a violation of the Rule it did not prejudice the defendant with these "subtle, psychological pressures" since both counsel were in the same position.

In discussing the adequacy of the charge and compliance with Rule 30, Conlin raises a few other points which should be clarified. Conlin complains that the Court violated Rule 30 when the jury requested supplemental instructions on Counts I through XIII. (Appellant's brief p. 41). Yet defense counsel never objected to the Court's response of rereading its general charge. Previously, government counsel convinced the Court that its response to an earlier question needed further explanation (Tr. 1551, 1552).

Conlin complains that the Court did not mention all of his "corroborating evidence." Yet a reading of the charge as a whole shows the court *did* cover a great deal of the defendant's evidence in a fair manner. As this Court said in *United States v. Simmons*, 281 F.2d 354, 359 (2d Cir. 1960), there is no duty on the court to marshal all the evidence for and against a defendant.

More specifically, Conlin complains that the Court's instruction did not touch on the testimony that Conlin said they made copies of Gill's returns that morning before going to the SBA office. However, the Court's instructions said precisely that (Tr. 1522).

Finally, the court very clearly framed the issue for the jury on whether these tax forms were there prior to Conlin's arrival and thus part of government's file, or were brought by Conlin. The court specifically told the jury it would have to decide that factual issue in its supplemental charge (Tr. 1551-1552).

The Government submits that the court's charge and it's handling of requests to charge did not deny the defendant his right to a fair trial.

POINT V

The government's proof was sufficient for a jury to conclude that the defendant was guilty of submitting a false loan application.

The defendant's assertions relative to Count XV are without merit. In essence, the defendant makes the same argument here as he did in POINT I, *supra*, regarding the sufficiency of the evidence. It is submitted that the evidence proferred by the Government on this count was clearly sufficient for submission of the count to the jury. This is especially true where the reviewing Court must examine the evidence in the light most favorable to the government, making full allowances for the jury to assess the credibility of the witnesses, weigh the evidence and draw justifiable inferences from it. *U.S. v. Barash*, 412 F.2d 26 (2d Cir. 1969); *Appellee's Brief*, POINT I, *supra*.

The evidence regarding Conlin's submission of the tax return on his loan application, in addition to the testimony of the SBA official concerning loan requirements, was that:

1. the 1971 tax return of Conlin submitted was an apparent copy of a filed return.

2. this tax return had a date on it of "April 2, 1972" in Conlin's handwriting apparently to indicate when it was prepared and filed.

3. contrary to the assertion by the defendant in his brief that there was no proof that anything contained in the tax return was false, there was proof that the claimed estimated tax payment of $4200 was false (Tr. 615) that the date was false (Tr. 615) and that Conlin knew they were false because in November, 1972, seven months after this return was purportedly completed, Conlin told Special Agent Donald Meyer, I.R.S., that he had not prepared it and had only paid $1585 in estimated taxes (Tr. 612-617)

4. the materiality of these false statements lies in the fact that Conlin was asking for a low interest loan claiming a loss of substantial assets and the return had to show not only that he had sufficient income to have those kinds of assets, but that he could afford to pay back the loan. The $4200 estimated tax payments claimed indicate he had substantial income in the previous year (which he did not Tr. 1129) and that he did not owe the government very much taxes over and above the estimated tax payments (Tr. 1122-1137, App. II).

5. Conlin's explanation of this evidence was patently unbelievable (Tr. 1122-1137, App. II).

6. the pertinent dates are:

a) April 2, 1972 — date return *apparently* prepared and estimated payments of $4200.

b) April 14, 1972 — date of extension request showing payment of $1585 (Ex. 54)

c) November 10, 1972 — date of conversation with Special Agent Donaly Meyer where Conlin said he hadn't prepared 1971 return and only paid $1585 in estimated tax.

d) January, 1973 — date application for loan submitted to SBA along with apparently filed 1971 tax return.

e) October, 1975 — date the 1971 tax return was actually filed.

On the basis of this evidence, and other evidence clearly within the record, the court properly submitted the case to the jury on this count and the jury reached an appropriate verdict.

POINT VI

The defendant was given a full and fair trial and the evidence taken as a whole was substantial enough for this Court to affirm the convictions.

The defendant's assertions regarding other errors in the trial are without merit and the defendant has not shown any prejudice as a result of the claimed errors.

A. *Discovery and Inspection*

While the record fails to disclose in detail the scope of discovery allowed, it is submitted that the defendant had very liberal discovery. This discovery and inspection was allowed through informal conferences between Judge Burke and counsel for the government and the defense. The defense repeatedly asked for additional items which were voluntarily turned over to them. In fact, Jenck's Act material was given to the defendant long before the actual trial began.

While it is difficult to argue this point based upon a record, it is submitted that the defendant has failed to allege a single instance where he was prejudiced by the lack of discovery.

B. *Newspaper Publicity*

The defendant's claim that the trial court took no steps to insure that jurors were not exposed to newspaper publicity is without merit because the defendant has failed to show even one instance of inaccurate reporting, disclosure of private evidence taken outside the hearing of the jury, or any instance of prejudicial effect upon the defendant as a result of the newspaper publicity.

While such a warning may be effective to prevent the jury from reading the newspaper, such a caution would only seem to be necessary where the defendant can show some prejudice. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

C. *Admission of Evidence*

The defendant claims error because the trial judge admitted a financial statement of the defendant that was not signed by the defendant or prepared by him (Ex. G-79). The document is not totally without foundation because the defendant admits that he had a conversation with the preparer of G-79 at that time (Tr. 1120-1121). Furthermore, the defendant practically verified the figures on the statement in his testimony (Tr. 1121). Moreover, the admission of G-78 into evidence tends to verify the figures contained in G-79; and this was a signed financial statement by the defendant (Tr. 1122-1126, App. II).

The defendant in no way shows that the prejudicial effect of admitting this exhibit outweighs its probative value. In fact, other than a bold statement that it is prejudicial, the defendant does not show any evidence of prejudice. The admissibility of the evidence is certainly discretionary with the trial judge. Its worth was clearly reduced by the statements of the defendant (Tr. 1120-1137). The admission of one exhibit in light of all the other evidence in this case, even if improper, can hardly be said to deprive the defendant of a fair trial.

D. *Speedy Trial*

The defendant's claims regarding his denial of rights to a speedy trial are without merit. Although there was some delay, there is no evidence that this delay was purposeful in order to give the government an advantage. Furthermore, the defendant never made a motion to dismiss, or in any way asserted that he wanted a more prompt trial. Other than the defendant's belated claim of prejudice in his brief, there is no other time that the

defendant ever mentioned a denial of speedy trial, and there is not one scintilla of evidence to show how the defendant was prejudiced.

The Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1971) set out the criteria by which the Sixth Amendment right to a speedy trial is to be judged. Under this criteria, the defendant was not denied a speedy trial.

CONCLUSION

It is respectfully submitted that the defendant was given a full and fair trial and that if there were error in the record, and the government does not concede this, the error is harmless in light of the substantial evidence against the defendant.

The convictions should be affirmed in every respect.

Respectfully submitted,

RICHARD J. ARCARA
United States Attorney

By: GERALD J. HOULIHAN
Assistant United States Attorney

On the brief:
Gerald J. Houlihan
Eugene Welch

Affidavit of Service

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Russell D. Hay/President
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January 6, 1977

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State of New York)
County of Onondaga) ss.:
City of Syracuse)

JOHNSON D. HAY,
Being duly sworn, deposes and says: That he is associated with Spaulding Law Printing Co. of Syracuse, New York, and is over twenty-one years of age.

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Attorney(s) for **United States,**

(X) he personally served three (3) copies of the printed ~~XXXXXXX~~ [2] Brief [1] Appendix of the above entitled case addressed to:

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(By David M. Levy, Esq. and
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Johnson D. Hay

Sworn to before me this **6th** day of **January, 1977.**

.....
~~Notary Public~~
Commissioner of Deeds

cc: Richard J. Arcara, Esq.

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76-1346

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Attorney(X) for **United States,**

2 Briefs, 1 Appendix

(X)he personally served three (3) copies of the printed ☒ 2 Brief ☐ 1 Appendix of the above entitled case addressed to:

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